

**Approved 7/18/07**

**TOWN OF CUSHING  
PLANNING BOARD  
Minutes of Meeting  
June 20, 2007**

**Board Present:** Chairman Dan Remian, David Cobey, Bob Ellis, Evelyn Kalloch, Frank Muddle and Recording Secretary Crystal Robinson

**Absent:** None

**1. Call to Order:** Chairman Remian called the meeting to order at 6:10 P.M. and took a roll call, noting that CEO Bickford was on vacation. The chairman said he wanted to modify the agenda to take Item #2 first.

**2. Modification of Map 6, Lot 6, portion of Hornbarn Hill Subdivision, Concerning Well Restriction Zone and New Placement of Septic Field:** Mr. Remian established that Mr. Tower's drawing R1.1, dated 5/16/07, was the reference for discussion. Mr. Tower said the purpose was to remove the septic system rectangle and its associated well restriction zone, as well as to reflect boundary lines shifted by the surveyor in order to place pins at the top of banks. Mr. Muddle said the drawing did not show access to the Lot 13 driveway easement. Other minor changes were discussed.

Mr. Hull asked from the audience if the Board had Mr. Lord's plan for Lot 6. Mr. Remian said he did and Mr. Lord should have a permit this evening if the Board signed off on Mr. Tower's drawing. Mr. Hull said he was concerned that the Mylar might not be signed tonight. Mr. Remian said Mr. Lord would not need formal approval from the Board to change the location of his well/septic once the circles were removed.

**ACTION:** Mr. Remian made a motion, seconded by Mrs. Kalloch, to accept this drawing with the restriction that it was for the removal of well restriction zones only.  
Carried 5-0-0

Mr. Remian said the conditional approval would be noted on the Mylars.

**3. Continuation from June 6 of Robbins Mountain Subdivision Review for Completeness, Map 5, Lots 84, 85 and 86:**

**ACTION:** Mr. Cobey made a motion, seconded by Mrs. Kalloch, that the Board address some items that seemed to clearly be a problem with approval of the application, notably issues about "lotting" and about the land use of the east parcel of the property.  
Carried 4-0-1 (Mr. Muddle abstained)

Mr. Cobey explained that by "lotting" he referred to frontage on a public way, a 150' circle on a lot and that the east parcel did not meet the land use requirements for recreation purposes because of dimensions. Mr. Ellis noted that these concerns had been included in Mr. Cobey's written observations. Mr. Cobey referred to Subs. 9.2(B) in the Subdivision Ordinance [SO]. Mr. Remian interrupted to say that Mr. Tower had provided drawings late, with the second set incomplete because it had no wetlands depicted. The chairman said the Board would work with the 4/16/07 drawing. Mr. Cobey said Lots 2 & 11 did not meet the Subs. 9.2(B) regulations regarding frontage criteria. Mr. Ellis said 9.2(B) referred to lots on a public or private way, which Lots 2 & 11 were not. Mr. Cobey read Subs. 9.1(D) aloud and said the lots in question were flag lots. Mr. Ellis repeated 9.2(B) and Mr. Remian said that 9.1(D) addressed that. Mr. Cobey stated that there was no provision in the SO for lots not located on a private or public way. Mr. Ellis said there was no exclusion of them. Mr. Cobey and Mr. Remian said that Lots 2 & 11 were flag lots. Mr. Tower said there was a section in the SO that said unless something was specifically prohibited it shall be allowed, but Mr. Cobey said that was in the Shoreland Zone Ordinance [SZO], not the SO. Mr. Ellis said it looked as though 9.1(D) did prohibit those lots. Mr. Tower and Mr. Cobey disagreed as to the interpretation of 9.1(D) and the definition of flag lots.

Mr. Cobey said the second issue was that a 150' circle could not be contained within Lot 9. Mr. Tower said that was a valid point and his revisions addressed that. Mr. Cobey's third point was that the SZO requirements for recreational use, Subs. 15(A), required a minimum lot size of 40,000 Sq. Ft. and minimum shore frontage of 200',

neither of which was met on Lot 9. Mr. Tower said it was a lot of record. Mr. Cobey said the three items he had discussed were a problem for him in approving the subdivision; he suggested the applicant address these issues and come back.

Mr. Remian said that Mr. Tower had provided the well location on Lot 1, though no test pit was shown. Mr. Tower agreed that the 150' circle on Lot 9 was not on the 4/16/07 drawing and said that drawing had been changed. With regard to the recreational area, Mr. Tower said it was a lot of record, though 1,000 Sq. Ft. short of the ordinance requirement, and a waiver must be requested since it included all the land he owned. The developer said it would be sold for a house lot if the Board would not grant a waiver. The chairman asked the developer his intention and Mr. Tower responded that he felt further discussion of the interpretation of the ordinance was needed, concluding with a consensus from the Board. He also asked for a vote on his waiver request and agreed with the chairman that the well restrictions should go. Mr. Ellis said that if the applicant were going to redesign his plans in order to accommodate some of the aspects discussed, he might want to submit a new application because the new standards allowed flag lots. There was continued discussion of flag lots.

**ACTION:** Mr. Muddle made a motion, seconded by Mr. Ellis, that Subs. 9.1(D)'s reference to flag lots does not apply to Lots 2 & 11.  
Failed 2-3-0 (Mr. Muddle and Mr. Ellis voted in favor)

Mr. Remian, Mr. Cobey and Mrs. Kalloch all said they voted against because Subs. 9.1(D) prohibited flag lots. The chairman then asked the Board to move on to Lot 9. Mr. Cobey said he did not think the Board needed to vote on Lot 9 because it did not meet Subs. 9.2(C). Mr. Muddle suggested not spending time on Lot 9 because the Board did not have the new drawing that purportedly showed a 150' circle fitting on the lot.

Mr. Remian said the next topic of discussion would be the common area, under the old SZO. Mr. Cobey said there were additional issues on the east lot that he felt should be discussed. He said his comments had to do with drainage on this property and someone else's property and referred the Board to his 5/4/07 observations to the CEO. Mr. Cobey read aloud from Item #7 in which he said that the plans should show the location, size, capacity and elevations of the culvert under Pleasant Point Road to satisfy regulations he listed.

**ACTION:** Mr. Cobey made a motion, seconded by Mrs. Kalloch, that we grant a waiver to the size and dimensional requirements of the common area for recreational purposes, with the condition that Mr. Kemper's recommendations be met regarding limiting disturbance in the wetland to a 6' clearing.  
This motion was withdrawn

There was discussion and clarification by Mr. Cobey of the items in Mr. Kemper's 8/8/06 memo. Mr. Kemper's points concerned reducing the number of parking spaces and not cutting vegetation to construct the pier. Mr. Tower said he had reduced the number of spaces. Mr. Ellis suggested a vehicle gate that would limit activity to subdivision owners in order to alleviate the neighbor's concerns and Mr. Tower said he thought that could be done.

**ACTION:** Mr. Cobey made a motion, seconded by Mr. Ellis, that we grant a waiver to the size and dimensional requirements of the common area for recreational purposes, with the condition that, based on the 5/3/07 layout of paving by Engineering Dynamics, we add the condition that no trees or vegetation be removed from the site except for that construction and for a 6' access to the water.  
Carried 4-1-0 (Mr. Remian voted against)

**ACTION:** Mr. Cobey made a motion, seconded by Mr. Ellis, to change his previous motion to replace the word "paving" with "Vehicular surface".  
Carried 4-1-0 (Mr. Remian voted against)

The chairman said that Mr. Tower was correct that his application would be denied due to the motion on flag lots. He asked the developer if he would be willing to do some redesign to accommodate the regulations as interpreted by the Board's motion. Mr. Cobey said he would like to see more discussion on the application before that happened because there were other issues to be addressed. Mr. Tower responded that a considerable amount of time, energy and effort had been expended in the placement of building envelopes so the view from each lot was not obstructed by a structure in a lower lot. It was from those efforts that the shape of the lotting arrangement had come about, he said, and any redesign to comply with the majority interpretation of 9.1(D) would reduce the number of lots, having an adverse financial impact. Mr. Cobey said coming back with a new application would allow the flag lots, and thus would not require a reduction in the number of lots. Mr. Tower replied that he would not start over and reapply. It was Mr. Tower's opinion that a redesign would result in the loss of one or two lots, costing him

approximately \$400,000. Acknowledging that the Board did not have to consider economic impact, he said he felt his decision would be to spend \$30,000 on an attorney to fight it out in court. He said this was purely a business decision and did not imply the Board did not have a right to its interpretation of the regulations. Mr. Ellis suggested it would be more practical to consider applying under the regulations just voted in.

Mr. Remian said the Board did not have a drawing of what it was reviewing. Mr. Tower said he had gotten his new plans in by that Monday, as agreed, but they were refused. Mr. Remian said Mr. Bickford had left a note saying Mr. Tower would be back with other plans, which he had delivered tonight. Mr. Tower said that if Mr. Bickford could find a way to say no he did and if he could find a way to stir up trouble he did. Mr. Remian said that was not relevant because these drawings had about a third of the information of another drawing. Mr. Tower asked the Board to tell him the rest of their concerns so they could make a decision where to go from here.

Mr. Tower said the town had no standards for many of the issues Mr. Cobey brought up. Mr. Cobey responded that there were requirements in the SZO and Mr. Tower agreed, but said there were no standards. Mr. Tower said he had met the requirements in the past with similar information. Mr. Cobey said he was not dealing with the past and Mr. Remian said a lot of mistakes had been made in the past. Mr. Tower said he had supplied what he thought was adequate and Mr. Remian said the Board had his evidence and would have to make a judgment based on that. The chairman said the Board had been trying to work with the developer for a long time so this application would not be denied. Mr. Ellis said the issue of standards had thrown such a big wrench into the review that it did not seem practical to continue because the Board could not go further with lots that did not comply. Mr. Tower disagreed, saying the Board could point out the things it thought did not comply and decide if they were adequate cause for denial. Mr. Muddle said he thought the Board should finish its review and list why it would approve or not approve. Mr. Remian said he was not comfortable not having the drawing the Board would be signing. He said the Board needed a drawing that included all the changes they had been asking for and said it was the applicant's choice whether to table or move ahead. Mr. Tower said he would like the Board to continue its review and to continue to itemize any areas of concern.

**ACTION:** Mr. Ellis made a motion, seconded by Mr. Cobey, to continue to review where we left off at the last meeting.  
Carried 5-0-0

The Board said it would start with Subs. 7.8 (Aesthetic, cultural and natural values). Mr. Cobey referred to the rough minutes of the last meeting and his question regarding clearing on Meduncook Plantation lots. Mr. Tower repeated his response that he thought there would not be clearing, but only removal and thinning of trees. He said he would adhere to conditions on an adjoining property but he felt that was not germane to this issue. Mr. Cobey questioned whether Mr. Tower's assertion that he would be changing the species of trees was actually landscaping that changed the type of vegetation and the canopy. In addition, he asserted that the equipment involved in clearing 20% to 90% of the trees would have an effect on drainage characteristics on the ground. Mr. Cobey said the developer's application to the DEP referred to minor clearing and he was concerned that the proposed subdivision would not meet the scenic requirement. Mr. Cobey said he would like an independent opinion on whether Mr. Tower's clearing would have an undue adverse effect on the scenic or natural beauty of the area. Mr. Tower responded that Becky Maddox and Jim Cessida had said he had met every condition but scenic character. Mr. Ellis said he was satisfied that Mr. Tower's replanting and scenic requirements would allow the lots to fit in tastefully.

Mr. Remian quoted Mr. Tower at the March 2007 site walk as having said all the trees were going; the chairman said this could cause problems, based on the topography. Mrs. Kalloch agreed that could certainly cause erosion on a mountain. Mr. Tower said the preponderance of trees on this site were mature red spruce, which lost their support when thinned. They were then susceptible to blow downs, which posed a danger to houses, and that was why he wanted to change the vegetation to shorter native species less susceptible to severe winds. He cited instances of severe wind damage done to trees on his other Cushing subdivisions.

Mr. Remian quoted the developer as having said, at the Public Hearing, that the houses in this subdivision would not be visible from Pleasant Point Road and asked how he would accomplish this. Mr. Tower responded that anything built on Lot 1 would be visible. Otherwise, the steepest slopes occurred nearest Pleasant Point Road, creating a brow line behind Lot 1 that, with vegetation, would help to obscure the other houses. Mr. Tower said the houses would be visible from the river, which Mr. Remian said he did not want to see. Mr. Tower said this was also what the DEP did not want to see, because it considered all bodies of water to be protected resources and felt all unsightly development should be screened from them.

**ACTION:** Mr. Ellis made a motion, seconded by Mr. Muddle, for a positive finding of fact on Subs. 7.8 (Aesthetic, cultural and natural values).  
Carried 4-1-0 (Mr. Remian voted against)

Moving on to 7.9 (Conformity with local ordinances and plans), Mrs. Kalloch said she felt this was one of the more difficult criteria to assess. Mr. Cobey said he thought the Board had agreed to skip this for now. For Subs. 7.10 (Financial and technical capacity), Mrs. Kalloch said the Board had a letter from Machias Savings Bank, dated 4/18/07, on record.

**ACTION:** Mr. Cobey made a motion, seconded by Mr. Muddle, to accept the performance guarantee in the form of Article 11.1.  
Carried 5-0-0

Mr. Cobey said he felt the sale of any lot should be forbidden until all improvements had been made. Mr. Muddle asked him if he were attaching 11.1 to the approval of 7.10 and Mr. Cobey said he was. Mr. Tower responded that he had provided the Board with the letter from his bank, including the words specifically requested and he would like that to be considered adequate. Mr. Cobey stated that he did not consider it adequate. Mr. Remian characterized it as a non-specific opinion from the bank. In addition, he said, there was a \$9.5 million loan from the bank that Mr. Tower was obligated to repay by 7/21/07. Mrs. Kalloch asked why 11.1 had to be added to 7.10 and Mr. Cobey said his reason was that the Board had no adequate evidence of financial capacity. Mr. Tower asked the Board if Cushing's ordinance prohibited the sale any lot before the fire pond was in. When they agreed this was so, Mr. Tower said the fire pond was at the end of the road, so clearly it had to be in and approved by the Fire Chief before any lots could be sold. The developer said he wanted to avoid redundancy that might require coming back to the Board for a decision as to whether a condition had been met. Mr. Cobey asked Mr. Tower if he objected to completing all improvements before selling lots. Mr. Tower responded, again, that it was one more condition he would have to come back to the Board and deal with. Mr. Cobey said it was a condition that protected potential buyers, which he wanted to do. Mr. Tower said he did not see that as the Board's job. Mr. Muddle ascertained that roads, power, the recreational area and anything else shown on the subdivision plan would be included under the term "improvements". Mr. Ellis said the Board had jumped back and forth from criteria to standards and he thought Articles 11.1 and 7.10 presented reasonable satisfaction. Mr. Remian asked what evidence the applicant had presented to state that he had the financial capacity to complete the project. Mr. Ellis said the letter from the bank satisfied that requirement. Mr. Remian disputed this. Mrs. Kalloch said it was an opinion received in an email from a bank vice-president.

**ACTION:** Mr. Muddle made a motion, seconded by Mr. Cobey, that the applicant had submitted sufficient information concerning his financial and technical capacity to meet the standards of Section 7.10.  
Carried 3-2-0 (Mrs. Kalloch and Mr. Remian voted against)

The Board agreed that 7.11 (Surface waters, outstanding river segments) did not apply. Mr. Remian moved on to 7.12 (Groundwater) and Mr. Muddle said concern about this was expressed at the Public Hearing but there was no empirical data. Mr. Cobey asked the developer if he was adding anything to the groundwater. Mr. Tower said only the septic systems could make an adverse impact on the groundwater. Mr. Cobey asked about junk that was filtered out of the runoff in the filtration basin. Mr. Tower said it must be removed when it accumulated to a certain depth so it did not impair the function of the basins. He said the Homeowners' Association would take care of this per DEP requirements.

**ACTION:** Mr. Muddle made a motion, seconded by Mrs. Kalloch, to accept 7.12 (Groundwater) conditions based on the information given to us by the applicant.  
Carried 5-0-0

The Board established that there was no note on the plan regarding the flood plain. Mr. Tower said there was no structure proposed within the flood plain and Mr. Ellis said a note must be included.

**ACTION:** Mr. Ellis made a motion, seconded by Mrs. Kalloch, for a positive finding of fact on 7.13 (Flood areas) provided that the condition is noted on the plan.  
Carried 5-0-0

**ACTION:** Mr. Remian made a motion, seconded by Mr. Ellis, for a positive finding of fact on 7.14 (Freshwater wetlands) based on the applicant's submission.  
Carried 5-0-0

Mr. Remian stated that Mr. Tower's response to 7.15 (River, stream or brook) was that none of these existed within the lots of Robbins Mountain Subdivision. Mr. Muddle said there was a drainage stream east of Pleasant Point Road but Board members said the DEP had said this did not qualify.

**ACTION:** Mr. Remian made a motion, seconded by Mr. Cobey, that 7.15 (River, stream or brook) did not apply.  
Carried 5-0-0

On 7.16 (Storm water), Mr. Cobey said he would like an independent review on this (as well as Items 6-10 in his written remarks) because he was concerned about runoff and provisions to control erosion on Lot 1 and to the west of Lot 1. Mr. Cobey then reviewed his written comments and asked that they be attached to the minutes. Mr. Tower contested some of Mr. Cobey's contentions and the latter said that he wanted a third party review because it was difficult to evaluate drainage direction from the topography.

Mr. Ellis said he would like to hear Mr. Tower's explanation of the drainage of one of the back lots and how the water would reverse direction and whether the submission to the DEP was based on ground topography or aerial contours. Mr. Tower said the storm water management plan had been prepared by a registered professional engineer and approved by the DEP. In addition, he said most of Mr. Cobey's comments were reasonable questions raised by someone who did not fully understand storm water mitigations and calculations. Finally, he said, the town had no specific storm water standards for the applicant to meet; thus, he had met the state requirements and hoped the town would find that adequate to make a positive finding of fact. Mr. Muddle ascertained from the applicant that the DEP would issue an order when all requested changes, many of which he had discussed with the Board, had been made. Mr. Cobey conceded that the standards used would be those of the state, but he said he was not informed enough to act on this without an independent review.

Mr. Muddle said the Board needed the final approval from the DEP. Mr. Tower said he could try to get a copy of the memorandum from the DEP to the project manager. He said he was currently doing an evaluation of the impact on the scenic character, which needed to be resolved for final DEP approval. Mr. Ellis asked why scenic character would hold up storm water approval. Mr. Tower said it was not holding up storm water but that there were 25 criteria that had to be met in the DEP site law application; 24 were met and only scenic character remained. Mr. Ellis said he did not have Mr. Cobey's level of understanding and he would have to depend on DEP's approval. Mr. Cobey said the Board did have criteria (he read some sections of the SO aloud) and said he was lacking information, not expertise. Both he and Mr. Remian said they had asked for contour lines. There was further discussion of culverts, ROW and recent storms. Mr. Cobey said there was no information regarding the culvert and the property owner had said at the last ordinance meeting that the ditch kept silting up.

**ACTION:** Mr. Cobey made a motion, seconded by Mr. Remian, to request an independent engineering review of storm water improvements the applicant had created to date, for reasons cited in the previous discussion.  
Failed 2-1-2 (Mrs. Kalloch abstained, Mr. Ellis and Mr. Muddle were opposed)

Mr. Tower said he would provide the final memorandum from the reviewing engineer. He also said he would notify the Board how he planned to deal with the flag lot issue within two days. Mr. Tower said this was a failing criteria in the Board's perspective and it had only 30 days to file an appeal in Superior Court. He advised the Board that the court had taken the step of ordering mediation and naming a mediator and a solution should soon be forthcoming. He said he felt the town and state had an extremely difficult case. Mrs. Kalloch said she took that as a threat.

**4. Adjournment:** The meeting adjourned at 9:15 P.M.

Respectfully submitted,

Deborah E. Sealey  
Recording Secretary